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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1236

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL, TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

==========

PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE FOURTH CIRCUIT

==========

Frank L. Carson, Lawrence Hatcher, and Stuart E. Mines, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on September 14, 1979, dismissing an appeal by petitioners from an order, entered June 2, 1977, by the

United States District Court for the Eastern District of Virginia, Richmond Division, denying a joint motion by the parties to approve and enter a consent decree.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is reported at 606 F.2d 420 and is set forth in the Appendix. The opinion of the District Court is reported at 446 F.Supp. 790 and is set out in the Appendix.

JURISDICTION

The judgment of the Court of Appeals dismissing the appeal was entered on September 14, 1979. See Appendix. Following this dismissal, petitioners filed a motion with this Court for an extension of time in which to file a petition for a writ of certiorari. On December 6, 1979, the Court granted the motion and ordered the time for petitioners to file a writ of certiorari extended until, and including, February 11, 1980.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States.

This case also involves the following federal statutes:

a. 28 U.S.C. §1291

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

b. 28 U.S.C. §1292(a)

> The court of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

c. 42 U.S.C. §2000e-2

> (a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

....

(c) It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities

or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

....

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

d. Rule 23(e), Federal Rules of Civil Procedure

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that petitioners were not entitled under 28 U.S.C. §§1291 and 1292(a)(1) to appeal a denial by the district court of a joint motion by the parties to approve and enter a proposed consent decree enjoining defendants from engaging in unlawful discriminatory actions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, et seq., and 42 U.S.C §1981?

2. Whether the federal district court below erred in holding that the due process clause of the Fifth Amendment to the Constitution of the United States and Title VII of the Civil Rights Act of 1964, prohibit federal courts from judicially approving, in the absence of discrimination by defendants against plaintiffs and other class members, proposed consent decrees providing for

remedial use of race-conscious affirmative action program in accordance with requirements set forth in United Steelworkers of America, AFL-CIO-CLC v. Weber, ___U.S. ___, 61 L.Ed. 2d 480 (1979)?

3. Whether the district court below applied proper criteria, or otherwise abused its discretion, under Federal Rules of Civil Procedure 23(e) in refusing to approve a proposed settlement by the parties of a Title VII class action?

STATEMENT OF THE CASE

General. On October 24, 1975, petitioners, present and former seasonal employees at the Richmond Leaf Department of the American Tobacco Company, a subsidiary of American Brands, Inc., which is located in Richmond, Virginia, filed a complaint on behalf of themselves and other black employees at the Richmond Leaf Department. The complaint charged that defendant American Brands, Inc., defendant Tobacco Workers' International Union, and defendant Local 182 of the Tobacco Workers' International Union, in violation of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., and 42 U.S.C §1981, discriminatorily denied black workers hiring, promotion, and transfer opportunities and discriminatorily restricted

black workers to low paying and otherwise undesirable jobs.

After the conduct of extensive discovery, the district court, on March 1, 1977, certified a class consisting of (1) black persons, currently and formerly employed who were seasonal employees of the American Tobacco Company's Richmond Leaf Department on or after September 9, 1972, and (2) black persons who applied for seasonal employment at the American Tobacco Company's Richmond Leaf Plant on or after September 9, 1972.

The parties reached a settlement of plaintiffs' claims, entered into a proposed consent decree, and jointly moved for approval and entry of the proposed decree. The district court denied the motion on June 1, 1977.

On May 14, 1979, the United States Court of Appeals for the Fourth Circuit ordered the merits of the appeal to be determined en banc. On September 14, 1979, however, the Court of Appeals ordered the appeal dismissed on the ground that the order appealed from below was not appealable within the intendment of 28 U.S.C. §§1291 and 1292. Chief judge Haynsworth and circuit judges Winter and Butzner dissented in an opinion holding that the order was appealable and that the consent decree should have been approved.

History of Racial Discrimination. American Brands, Inc., employs 150 seasonal employees and 100 regular, or full-time, employees to process and store leaf tobacco at the Richmond Leaf Department of the American Tobacco Company in Richmond, Virginia. The seasonal employees, all of whom are black, work between six and nine months during the year. By contrast, regular employees, of whom 34% are white, work throughout the year.[1/] Both the seasonal and regular employees are represented by defendant Local 182, Tobacco Workers' International Union (herinafter "T.W.I.U.").

Prior to September 16, 1963, union jurisdiction over job positions at the Richmond Leaf Department was divided betweeen Local 182 of the T.W.I.U. and Local 214 of the T.W.I.U. The former, whose membership was then all white, had exclusive jurisdiction over regular job classifications. Local 214's membership was limited

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1/ The following table represents the racial composition of the employees at the Richmond Leaf Department from 1968-1976:

Year	Regular Employeed		Seasonal Employees	
	Whites	Blacks	Whites	Blacks
1968	41	52	0	116
1970	40	59	0	175
1973	40	56	0	176
1976	37	57	0	135

to black employees who were seasonal workers at the Richmond Leaf Department.

While the existence of two separate unions at the Department was officially terminated on September 16, 1963, the pre-existing patterns of racial discrimination, however, continued in effect at the Richmond Leaf Department as a consequence of regulations and procedures establishing the system of seniority and transfer rights of employees.

Seniority and Transfer Rights. Prior to September 16, 1963, permanent job vacancies were filled by canvassing the employees within the bargaining unit of the union having jurisdiction of the jobs in which the vacancies existed. This procedure benefitted the white members of Local 182 in the competition for permanent job positions.

Following the 1963 merger of the Locals, the rules governing the filling of vacancies in the full-time positions continued to exclude or disadvantage the black workers who had been discriminatorily assigned to seasonal positions. When management requests a job transfer of a regular employee that employee does not lose seniority rights, but when management requests a seasonal employee to transfer to full-time work

that employee loses his seniority rights. Moreover, when a regular worker transfers from one full-time job to another one the employee retains all of his seniority rights, but when a seasonal worker transfers to a full-time job he loses all of his seniority rights.[2/] Furthermore, a seasonal worker who transfers to a full-time position almost always must enter at a bottom-level position because the regular workers have the first opportunity to move to the vacancies in full-time positions; accordingly, if a seasonal worker is employed in a seasonal position above the entry-level, he frequently will be required to suffer a short-term pay cut in order to move into a full-time position. The imposition of these penalties, the loss of seniority and the possible reduction in short-term pay, serve to lock in the effects of the historical discriminatory practices which existed at the Richmond Leaf Division. For example, as of February 13, 1976 only one of the 16 positions of watchman was held by a black employee.

2/ The transferring seasonal worker loses not only his "competitive" seniority rights, e.g., rights for job security and promotion, but also his "benefit" seniority rights, e.g., right for sick leave and vacation, except for retirement benefits. Cf. Franks v. Bowman Transportation Co., 424 U.S. 747, 765 (1976).

The historical practices of discrimination have continued to limit the employment opportunities of black workers for supervisory as well as hourly jobs. Almost invarably the Company selects its supervisory employees from its full-time staff. The Company has never promoted a seasonal worker directly to a supervisory position. The continuation of the effects of the past segregative practices has resulted in the selection of a disproportionately small group of the Company's black employees as supervisors. As of April, 1976, only 20% of these positions were filled by blacks.

Proposed Consent Decree. Discovery conducted by the parties following the commencement of this lawsuit showed dramatically the degree to which particular job classifications could be identified by race. It also showed the extent to which seniority rules and transfer rules impinged on the capacity of defendants to eradicate the vestiges of past racial discrimination. The parties, of course, had differing views on the extent to which such lingering effects exist. To resolve their disagreement and to settle the controversy, the parties negotiated a proposed consent decree settling all claims outstanding between them and presented it to the district

court, in accordance with Rule 23(e) of the Federal Rules of Civil Procedure.

One of the principal features of the proposed consent decree was a seniority clause requiring current and future employees to be credited with actual time worked at the plant as seasonal employees. Another feature of the proposed consent decree allowed seasonal employees to transfer to permanent job positions as vacancies occurred provided, of course, no regular employees desired the positions. These provisions were patterned after the relief fashioned for seasonal workers in Russell v. American Tobacco Company, supra, 528 F.2d 357, 362-64 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976). Under the first above-mentioned feature of the proposed consent decree, seasonal workers are allowed to maintain their seniority upon transfer to regular positions. Under the second feature, seasonal employees are permitted to bid on vacancies in classifications, such as watchmen, which were once reserved for whites.

In addition, the proposed consent decree contained, in Part III, section 5, an affirmative action provision to reduce a historical underrepresentation of blacks which had existed in the

supervisory positions. This provision provided that:

> The Richmond Leaf Department adopts a goal of filling the production supervisory positions of Foreman and Assistant Foreman with qualified blacks until the percentage of blacks in such positions equals 1/3 of the total of such positions. The date of December 31, 1980 is hereby established for the accomplishment of this goal.

Furthermore, the consent decree eliminated the requirement that seasonal workers must serve a probationary period when they transfer to a full-time position. Finally, the decree contained a general injunction prohibiting the defendants from discriminating against black workers and a reporting provision requiring the Company to submit for a three-year period specific reports detailing compliance with the Decree.

All of the parties found that these provisions represented, in light of the history of the Richmond Leaf Department, a settlement that was reasonable, just, and fair to all concerned. Despite their agreement, the district court, by order filed June 2, 1977, denied the joint motion of the parties to approve and enter the proposed consent decree.

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

A joint motion was made by the parties to the district court to approve and enter, pursuant to the requirements of Rule 23(e) of the Federal Rules of Civil Procedure, the proposed consent decree. The motion was denied. The district court offered several reasons in support of its refusal to grant the motion. First, the court stated that Title VII of the Civil Rights Act and the due process clause of the Fifth Amendment to the Constitution prohibited the court and the defendant employers and unions from awarding preferential treatment to employees based upon race except upon a showing of past or present discrimination. Second, the court said the proposed consent decree was fatally flawed in seeking to provide preferential treatment for black employees who were not shown to have been victims of discrimination. The court stated that the absence of discrimination was established by the fact that the proposed consent decree contained a provision in which the defendants denied that their actions had been discriminatory.

The issue of the appealability of the district court's order was raised when, upon appeal, the Court of Appeals for the Fourth Circuit

dismissed the appeal on the ground that the order was nonappealable under 28 U.S.C. §§1291 and 1292 (a)(1).

REASONS FOR GRANTING THE WRIT

The petition should be granted because of a conflict between the circuits. The importance and complexity of the issues are demonstrated by the convening of an en banc court and by the fact that the other two Circuit Courts of Appeals which have explicitly considered the issues have rendered conflicting decisions. The Fourth Circuit specifically noted that its decision was in accord with that of the Second Circuit in Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978) and contrary to the decision of the Ninth Circuit in Norman v. McKee, 431 F.2d 769 (9th Cir. 1970) cert. denied, 401 U.S. 912 (1971). The Fourth Circuit's decision also conflicts with the decision of the Eighth Circuit in Re International House of Pancakes Franchise Litigation, 487 F.2d 303 (8th Cir. 1973). The Second Circuit in Seigal v. Merrick, supra, like the Fourth Circuit, explicitly stated that its decision there was in conflict with Norman v. McKee, supra.

Circuit Judges, Winter, Butzner, and Chief Judge Haynsworth dissented below, holding that the

order was appealable under §1292(a)(1) as an interlocutory order refusing an injunction.

The petition should also be granted because of the importance of the issues raised. Two of the issues concern appealability of orders under the federal appeals statutes. The third, and final, issue concerns the ability of litigants to settle Title VII class actions, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, in accordance with criteria set forth by this Court in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra.

The first issue on appealability is whether a district court's refusal to approve a proposed consent decree is appealable, notwithstanding the "finality" requirement of 28 U.S.C. §1291, under the "collateral order" doctrine described in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).[3/] The second issue raised in this petition is whether such an order is appealable under 28 U.S.C. §1292(a)(1) if the proposed consent decree includes, as here, a request for injunctive relief and if the court's disapproval of the decree is based upon its determination that approval is prohibited by federal law. The

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3/ On this issue, the decision in Norman v. McKee, supra, is in conflict with the decision in Seigal v. Merrick, supra, and with the decision by the Court of Appeals below.

answers to these questions turn upon the proper interpretation and application of 28 U.S.C. §§1291 and 1292 (a)(1). This Court's response to these issues will be of crucial importance to the ability of litigants to settle actions and the effectuation of Congressional and judicial policies favoring settlement of actions by litigants themselves. Accord: Alexander v. Gardner-Denver Co., 415 U.S 36, 44 (1974); Regents of the University of California v. Bakke, 438 U.S 265, 364-65 (1978) (Opinion of Justices Bennan, White, Marshall, and Blackmun).

The Court's resolution of the third issue will decide whether the decision in Weber, supra, can be used by litigants in pending actions as a basis for settlement of private Title VII actions. In particular, it will resolve the question of whether a district court can seize upon the parties' inclusion, in a proposed consent order, of an exculpatory clause, whereby defendant is permitted to deny any discrimination against plaintiff, as a basis for denying approval of a consent decree which is in strict compliance with Weber.

I.

THE DISTRICT COURT'S ORDER DENYING THE PARTIES' JOINT MOTION IS APPEALABLE AS A COLLATERAL ORDER UNDER 28 U.S.C. §1291.

Petitioners agree that the policy of 28 U.S.C. §1291 disfavoring appeals from nonfinal orders is salutary and must be respected. Cooper & Lybrand v. Livesay, 437 U.S 463, 471 (1978); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978). Judicial orders which do not result in a judgment terminating the entire action are generally not final judgments within the intendment of §1291. Catlin v. United States, 324 U.S. 229 (1945). The purpose of the finality requirement is to prevent the debilitation of judicial administration caused by piecemeal reviews of a single controversy. Eisen v. Carlisle & Jacquelin, 417 U.S 156, 170 (1974). Catlin v. United States, 324 U.S. at 233. See Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546. This policy, however, is not frustrated by permitting appeals on certain collateral orders that cannot be reviewed effectively on appeal from a final judgment. Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546.

To insure that courts do not use this exception permitting appeals of collateral orders to defeat the obvious intent of the statute, this Court has held that the exception is only applicable to the small class of orders which

> finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be defined until the whole case is adjudicated.

Cohen, supra, 337 U.S. at 546.

The collateral order doctrine is applicable if (1) the merits of the collateral order are separate and independent from the merits of the action itself, (2) the collateral order has finally determined the "collateral" rights, (3) serious and irreparable injury has been caused by the collateral order, and (4) the collateral order cannot be effectively reviewed on appeal.

The order of the district court below satisfies each of these four criteria. The district court's order denying approval of the proposed consent decree determined conclusively and finally for the parties herein whether an affirmative action plan satisfying the requirements of Weber can be used as the basis for settling the litigation. In Weber, this Court upheld the validity of an affirmative action plan providing remedial relief to minorities who worked in occupations which had traditionally been closed to them. This Court noted that the plan approved in Weber between the United Steelworkers of America and Kaiser Aluminum & Chemical Corp., like the one here, did not require the discharge of white

workers or otherwise unnecessarily trammel upon the interests of white employees. Moreover, the plan, again like here, was voluntary and designed to break down traditional patterns of racial segregation and hierarchy. Additionally, the plan in Weber, like the plan here, did not create an absolute bar to the advancement of white employees. It was temporary and was created to eliminate a manifest racial balance and not to maintain racial balance. Finally, both the plan in Weber and the plan envisioned by the consent decree did not require a percentage of black employees greater than that of blacks in the labor force.

In approving the validity of the Kaiser plan, this Court held that the validity of the plan was independent of whether Kaiser or United Steelworkers had discriminated against blacks and was independent of whether any of the black employees who were to benefit from the plan were themselves victims of discrimination by either Kaiser or United Steelworkers.[4/] The proposed consent decree rejected by the district court below had an affirmative action component exactly like

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4/ To this extent the decision in Weber tracks the decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) where the Court approved the limited use of race-conscious plans without restricting their use to victims of discrimination by the originators of the plans.

the plan in Weber. Moreover, the sole basis for the district court's rejection of the proposed decree was the inclusion of an affirmative action plan in the absence of proof of discrimination by defendants against plaintiffs and the class members.

Thus, in rejecting the decree, the district court made a final determination of the parties' right to settle the action with a judicial decree incorporating a program of affirmative action based upon Weber. The opinion of the district court that a legal impediment existed to approval of the consent decree was a final determination which was not conditioned upon any further action being taken by one or both of the parties. The issues thereby decided by the district court were separate and independent of the issues raised in the Title VII action since, in order to prevail in that action, the petitioners must show that they and the members of the class are victims of discrimination by defendants. See Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Teamsters v. United States, 431 U.S. 324 (1977).

Moreover, the order of the district court below cannot be effectively reviewed upon appeal from a final judgment in this case since such a judgment would merely confirm that the petitioners had lost the very right which they were seeking to

protect, namely the right to settle the action without going to trial. The order will unquestionably cause irreparable injury to petitoners and respondents since it requires them to conduct an unnecessary, expensive, and time-consuming trial.

Sanctioning an appeal in this case is not inconsistent with the decision in Cooper and Lybrand v. Livesay, 437 U.S 463 (1978), where the Court, in not permitting an appeal of a district court's denial of a class certification order, warned against appellate courts indiscriminately thrusting themselves into the trial process. 437 U.S at 476. What is at issue here is the validity of a rule of law promulgated by the district court which asserts that the principles enunciated in Weber cannot lawfully be incorporated into a class action settlement. It is not an indiscriminate intrusion into the trial process to say that the order embodying this rule of law is reviewable upon appeal.

The considerations favoring appealability in this case parallel those in Gillespie v. U.S. Steel Corp., 379 U.S 148 (1964), where the Court allowed an appeal from a ruling of the district court striking various allegations of the complaint permitting recovery, and in Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555

(1963), where an appeal was permitted of an order by the Texas Supreme Court rejecting the defendant's venue objections. These cases recognized that a collateral order is appealable when the merits of the collateral controversy are separate and apart from the merits of the main action.[5/] In light of this Court's decision in United States Steelworkers of America, AFL-CIO-CLC v. Weber, supra, the district court's order disapproving the proposed consent decree does not involve the important factual and legal issues raised in the Title VII action. See Teamsters v. United States, supra.

II.

THE DISTRICT COURT'S DISAPPROVAL OF THE PROPOSED CONSENT DECREE IS APPEALABLE AS AN INTERLOCUTORY ORDER UNDER 28 U.S.C. §1292 (a)(1).

Read literally, §1292(a)(1), providing for appeals of interlocutory orders of district courts granting or refusing injunctions, is clearly applicable to the order of the district court below. It was so held by the dissenting judges

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5/ Application of Cohen requires that the merits of the collateral order not be "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Mercantile Nat. Bank v. Langdeau, supra, 371 U.S at 558.

below. They held that the order of the district judge was an interlocutory order refusing an injunction. The contrary decision of the majority was based upon their belief that decisions of this Court have put a gloss on the plain meaning of the statute. See Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966); Liberty Mutual Ins. Co. v. Wetzel, 424 U.S 737 (1976); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978).

The majority of the Court of Appeals held that these decisions limit the application of §1292(a)(1) to orders that are "interlocutory" in a special sense of the meaning of the term interlocutory. Cases such as Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., supra (disallowing an appeal of an order denying a motion for summary judgment requesting injunctive relief) and Liberty Mutual Ins. Co. v. Wetzel, supra (denying appeal of a judgment fixing liability while postponing determination on a request for permanent injunctive relief) were cited as authority for this proposition.

Petitioners contend that this Court's decisions have set forth the following criteria for application of §1292(a)(1). First, the order must be preliminary, i.e., one that is made before trial and is unconditional. Switzerland Cheese

Association v. E. Horne's Market, Inc., supra, 385 U.S at 25. Second, the order must do more than merely direct the case to proceed to trial. Id., 385 U.S. at 25. Also, Baltimore Contractors, Inc. v. Bodinger, 348 U.S 176 (1955) (an order refusing to stay referral of an issue from arbitration is not appealable under §1292(a)(1)).

Third, the order must settle, either tentatively or finally, some aspects of the merits of the claims. Switzerland Cheese Association v. E. Horne's Market, Inc., supra, 385 U.S at 25; Gardner v. Westinghouse Broadcasting Co., supra, 437 U.S. at 481-82. Fourth, the order must "pass on the legal sufficiency of the claim for injunctive relief." Gardner, supra, 437 U.S. at 481. Fifth, the order must have an "irreparable" effect. Id., 437 U.S. at 480. Finally, the order must not be one which can be reviewed "both prior to and after final judgment." Id.

Whether these six criteria are the proper ones for determining the appealability of an interlocutory decree under §1292(a)(1) and whether an order refusing approval of a proposed consent order encompassing a request for injunctive relief statisfies these criteria are important issues affecting successful administration of §1292(a)(1).

Petitioners contend that each of these six criteria is satisfied by the district court's decree disapproving the proposed consent decree. There is no doubt that the decree herein was preliminary, unconditional, and that it decided something other than that the parties must go to trial. The order effectively decided that an affrimative action plan identical to that in Weber could not be used, absent proof of discrimination, as a basis for settlement of a Title VII action. Thus, the order had the legal effect of precluding defendants from withdrawing their defense of prior discrimination, or from admitting the occurrence of such discrimination, and continuing the litigation on that basis. In this light, the order of the district court, when considered from the perspective of its legal impact on defendants' ability to modify or withdraw their defense, is analogous to the situations in Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956)(appeal is allowable from order dismissing two of plaintiff's claims) and in Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445 (1956) (appeal allowed of order dismissing counterclaim where it was based on transactions similar to those in plaintiff's claims).

The order disapproving the consent decree touched on the merits of plaintiffs' claims in a unique and significant way. It preliminarily resolved the issue of the legal sufficiency of the Title VII claims by holding that the history of defendants' employment practices and policies did not disclose an adequate legal basis for concluding that defendants had ever discriminated against blacks. Although this aspect of the order might conceivably be reviewable upon appeal from a final judgment, that aspect of the judgment which deprived the parties of the opportunity to fashion a settlement in accordance with Weber cannot be so reviewed. Finally, the order had an irreparable effect on the parties by forcing them to undergo an expensive, unwanted, and unwarranted, trial.

III

RULE 23(e) DOES NOT AUTHORIZE A FEDERAL DISTRICT COURT TO DISAPPROVE A SETTLEMENT MEETING THE REQUIREMENTS OF WEBER ON THE GROUND THAT THE CLASS MEMBERS ARE NOT NECESSARILY VICTIMS OF DISCRIMINATION BY THE DEFENDANTS

The parties' evaluation of discovery data and their assessement of the merits, established a basis for settlement of the action on terms reasonable and fair. The negotiations for the settlement were complex and difficult. For

two months, from February 1977 to March 1977, counsel labored at trying to find terms which were acceptable to all affected. In the proposed decree, each party stated that it was not admitting that it previously stated position was wrong.[6/] Based upon the data disclosed through discovery, reasonable settlement required the correction of the vestiges of earlier discrimination. The proposed consent decree purported to do this by undoing the effects of the discriminatory practices. Defendants were specifically enjoined to take action which had the effect of reversing the discriminatory rules.

6/ Thus, the final draft of the agreement provided that

> Defendants expressly deny any violation of the Fourteenth Amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, as amended, or any other equal employment law, regulation or order. This Decree and Consent hereto does not constitute a finding or admission of any unlawful or discrimintory conduct by defendants.
>
> Plaintiffs' consent to this Decree does not constitute a finding or admission that any of the employment practices of the Richmond Leaf Department of the American Tobacco Company, a division of American Brands, Inc., are unlawful.

The action of the district court in rejecting for the reasons which it did the parties' joint motion for approval of the proposed consent decree has seriously undermined this Court's decision in United Steelworkers of America v. Weber, supra, as well as undermined the successful implementation of Congressional policies favoring voluntary settlement of discrimination cases. See Alexander v. Gardner-Denver Co., supra, 415 U.S. at 44. In its recent decision in Weber, this Court took great pains to emphasize to private parties covered by Title VII that they could, without fear of being held in violation of Title VII, voluntarily negotiate and implement race-conscious, remedial plans whenever those plans were properly designed so that they did no more than carry out the essential purposes of Title VII.

Those purposes are basically as follows: (1) to break down old patterns of racial hierarchy; (2) to "open employment opportunities for Negroes in occupations which have been traditionally closed to them," Remarks of Senator Hubert Humphrey, 110 Cong. Rec. 6548; (3) to eliminate instances of manifest racial balance; and (4) to prohibit undue efforts to maintain racial balances. This Court held in Weber that affirmative action plans effectuating these purposes were

lawful as long as they did not unnecessarily trammel upon the interests of white employees by requiring their discharge or by creating an absolute bar to their advancement or by permitting a greater percentage of minority employees to be benefitted under the plan than which exists in the local labor force. Such plans were also required to be temporary since otherwise they would foreseeably operate to maintain an improper racial balance.

Although a decision on the correctness of the district court's disapproval of the proposed consent decree necessarily raises the general issue of what criteria are to govern an exercise of the district court's power to accept or reject settlements under Rule 23(e), see Flinn v. FMC Corporation, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 969 (1976); Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S 911 (1976), the only specific issue which must be determined here is the power of the district court to disapprove a proposed consent order merely because it provides for an affirmative action plan based on principles approved in Weber and instituted on behalf of minority employees who

have not been shown to be victims of discrimination by defendants.

Put another way, the precise question which has to be decided is whether Rule 23(e) can be utilized by a district court to effectively "overrule" this Court's decision in Weber and to frustrate federal policies favoring voluntary settlement of legal disputes. Subsumed under this question is the question of whether the district court, under the guise of exercising its discretion under Rule 23(e), can determine, as it did, that, as a matter of federal law, the implementation of a remedial scheme of preferential employment for minorities based upon principles set forth in Weber infringe thereby, in the absence of proof of discrimination by defendants against minority employees, upon the constitutional rights and statutory rights of white employees. Petitioners contend that such an action by a district court is an abuse of power under Rule 23(e) which requires immediate correction.

C O N C L U S I O N

For the reasons set forth herein, petitioners request that their petition be granted.

Respectfully submitted,

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APPENDIX

Decisions of the Courts Below

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2260

FRANK L. CARSON, LAWRENCE HATCHER, STUART E. MINES,

Appellants,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL, TOBACCO WORKERS INTERNATIONAL UNION,

Appellees.

Appeal from the United States District Court
For the District of Richmond, Virginia

Decided En Banc September 14, 1979

Reported at 606 F.2d 420

Before

HAYNSWORTH, *Chief Judge,*
and WINTER, BUTZNER, RUSSELL, WIDENER,
HALL and PHILLIPS, *Circuit Judges.*

K. K. HALL, *Circuit Judge:*

Plaintiffs seek an interlocutory appeal under 28 U.S.C. § 1292(a)(1) of the district court's refusal to enter a consent decree agreed to by the named parties in a Title VII class action.

The suit is based on claims of race discrimination and is brought against employer and union on behalf of black workers and black applicants for employment at an American Tobacco Company plant in Richmond, Virginia. The decree would grant money damages and hiring and seniority preferences to black employees and would set a goal requiring the employer to give preference to blacks in hiring for supervisory positions until a certain number of qualified blacks were employed. The decree was negotiated by representative plaintiffs, and it provides for notice to all class members.

The named plaintiffs contend that this relief is injunctive in nature, and, because the district court refused to enter the decree, its order is immediately appealable under § 1292(a)(1) as a denial of injunctive relief. We disagree.

The district court's order refusing entry of the decree does not deny any relief, whatever its nature. It merely requires the parties to either revise the decree or proceed with the case by trial or motions for summary judgment. The immediate consequence of the order is continuation of the litigation and, because the merits of the decree can be reviewed following final judgment, we think it is not an appealable order under § 1292(a)(1). Accordingly, we dismiss the appeal.

I.

In *Flinn* v. *FMC Corporation*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976), we heard the appeal of individual class plaintiffs alleging that the district court abused its discretion by entry of a consent decree in a Title VII sex discrimination class action. There, the overwhelming majority of class members had voted to adopt the decree, and the dis-

trict court entered it on the "eve of trial." With scholarly care, Judge Russell surveyed various interests supporting entry of the decree and posited the rule that, when a district court is presented with a consent decree, it should view the merits of the decree in light favorable to its entry. That is, it should, without requiring technical perfection or legal certitude, determine whether the law and the facts of record *arguably* support its terms. Under this standard, he identified factors which the district court should consider in exercising its discretion. These included "the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement, and the experience of counsel who may have represented plaintiffs in the negotiation." *Id.* at 1173.

Plaintiffs argue that the district court erred in failing to consider the proposed decree under the liberal standards of *Flinn*[1] and that its refusal to enter the decree is immediately appealable. Although we think the district court should have reviewed the proposed decree under *Flinn*, we do not think its refusal to approve the decree is a matter properly within our jurisdiction prior to final judgment.

In *Flinn*, the district court's *entry* of the decree terminated the action, whereas here the district court's order refusing it has no such effect—it continues the proceedings, making our review of it an interlocutory appeal.

II.

As a general rule appeals of right from interlocutory trial court decisions are not favored. 28 U.S.C. § 1291.

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[1] Counsel in this case failed to cite *Flinn* to the district court in their three separate memoranda of law filed in support of the proposed decree and failed to move the court following its order to reconsider in light of that case. Instead, they immediately brought this appeal.

Baltimore Contractors, Inc. v. *Bodinger,* 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233 (1955); *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 2459, 57 L.Ed.2d 351 (1978); *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478, 98 S.Ct. 2451, 2453, 57 L.Ed.2d 364 (1978). They disrupt the trial process, slow the course of litigation and create unnecessary multiple appeals. A single appeal following final judgment facilitates orderly litigation and comprehensive appellate review of all issues presented, many of which are dependent upon or related to other issues in the suit. After final judgment, the fact issues have been settled in the appropriate forum, and appellate review can be dispositive of all issues in the case. *See, Coopers & Lybrand* v. *Livesay,* 98 S.Ct. at 2460-61.

In the interests of justice, appeals of right from interlocutory orders are allowed when the delay in hearing an appeal after final judgment poses some irreparable consequence, *Gardner* v. *Westinghouse Broadcasting Co.,* 98 S.Ct. at 2453, or when the issue to be determined is sufficiently collateral to the ongoing litigation that no disruption of the trial process will attend early appellate review, *see Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546-47, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Coopers & Lybrand* v. *Livesay,* 98 S.Ct. at 2459.

Special statutory exceptions to the final judgment rule are set forth in 28 U.S.C. § 1292(a). Plaintiffs argue that characterization of the refused relief as "injunctive" is sufficient to meet the plain terms of § 1292(a)(1), which reads in pertinent part,

> The court of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the [district courts] granting, continuing, modifying, refusing or dissolving

injunctions, or refusing to dissolve or modify injunctions. . . .

But a mere labeling of relief is not sufficient. *See City of Morgantown, W. Va.* v. *Royal Ins. Co.*, 337 U.S. 254, 258, 69 S.Ct. 1067, 93 L.Ed. 1347 (1949). Courts look to the consequence of postponing appellate review following final judgment and weigh the need for immediate appeal against the important judicial interests militating against piecemeal review. *See Gardner* v. *Westinghouse Broadcasting Co.*, 98 S.Ct. at 2454; *Coopers & Lybrand* v. *Livesay*, 98 S.Ct. at 2460. This test is applied to appeals in class actions as well as to those in ordinary litigation.[2] Under this test, we find no appeal of right from orders refusing consent decrees at any time before final judgment.

III.

The consequence of the district court's order is not irreparable. No right is forfeited as a result of delayed review. Here, injunctive relief was not finally denied; it was merely not granted at this stage in the proceedings. *See Liberty Mutual Insurance Company* v. *Wetzel*, 424 U.S. 737, 744-45, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976). Like the denial of a motion for summary judgment which, if granted, would include injunctive relief, the denial of this consent decree decided "only one thing—that the case should go to

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[2] As the Court noted in *Coopers & Lybrand* v. *Livesay*, 98 S.Ct. at 2459:

> There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation.

trial." *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25, 87 S.Ct. 193, 195, 17 L.Ed.2d 23 (1966).

In *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978), the Supreme Court held that the pretrial denial of class certification in a Title VII case was not appealable under § 1292(a)(1) as a denial of injunctive relief. In that case, which involved allegations of sex-based discrimination, the complainant sought broad injunctive relief for the class similar to the relief proposed in the decree before us. The Court reasoned that the pretrial order denying class certification was not one of irreparable consequence since it could be reviewed at any stage of the proceedings either before or after final judgment, did not affect the complainant's personal claim for injunctive relief, and did not pass on the legal sufficiency of any claim for injunctive relief. *Id.* 98 S.Ct. at 2453-54 and notes 7, 8 and 9 (citing *Switzerland Cheese*).

IV.

The analogous consequences of a district court's disapproval of a settlement in a class action and its refusal to grant summary judgment were considered by the Second Circuit in *Seigal* v. *Merrick*, 590 F.2d 35 (2nd Cir. 1978). The issue there was whether, in a stockbroker derivative action, the court's order refusing settlement was appealable before final judgment.

Relying upon the analysis in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), a case decided the same day as *Gardner*, the *Seigal* court discussed the judicial and private interests always present where the rights of represented and unrepresented individuals may be compromised by the court's approval of a

settlement. The court explained the purpose of requiring class action settlements to be presented to district courts under Fed.R. Civ.Proc. 23.1.

> [A]n order disapproving a settlement . . . is based, in part, upon an assessment of the merit of the positions of the respective parties, and permits the parties to proceed with the litigation or to propose a different settlement.
>
> A settlement in an ordinary civil litigation is normally the sole concern of the parties. In stockholder derivative actions, on the other hand, because of the vicarious representation involved, the court has a duty to perform before an action can be "settled." . . . This approval cannot be a rubber stamp adoption of what the parties alone agree is fair and equitable.

Seigal v. *Merrick,* 590 F.2d at 37-38. The court pointed out that disallowing appeals of right from each refusal to enter a settlement had the practical effect of enhancing the district court's control over the litigation.

> [T]he denial of one compromise does not necessarily mean that a "sweetened" compromise may not be approved. The management of a derivative suit gives the trial judge a chance not only to disapprove a compromise but to edge the parties toward more equitable terms.

Id. at 39.

The *Seigal* court reasoned that a rule allowing appeals of right from orders refusing entry of settlements was unjustified. It would interrupt the litigation and thrust appellate courts indiscriminately into the trial process with-

out appreciable benefit to class members whose interests were to be protected.

Therefore, the court concluded that such an order was not appealable before final judgment. *See,* Note, *"Recent Developments: Appealability of District Court Orders Disapproving Proposed Settlements in Shareholders Derivative Suits,"* 32 Vand. L.R. 985, 998-1001 (1979). *Contra, Norman* v. *McKee,* 431 F.2d 769, 772-74 (9th Cir. 1970) *cert. denied, ISI* v. *Meyers,* 401 U.S. 912, 91 S.Ct. 879, 27 L.Ed.2d 811 (1971).

V.

We think this Title VII interlocutory appeal should be dismissed. Our review of this pretrial order has halted the litigation for over two years pending review of the district court's exercise of discretion. Given this disruption and the difficult burden on appeal of demonstrating an abuse of discretion, plaintiffs have identified no consequence requiring appellate review before final judgment. We perceive none. Instead, we think our review is best left to follow final judgment.

Under the *Flinn* analysis, the named parties may present a proposed decree to the district court in any form and at any stage in the proceedings. If one decree is refused another may be proposed. At any time the district court can reconsider its refusal to enter a decree. *See Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U.S. at 547, 69 S.Ct. 1221.

When a district court objects to the terms of a decree, alternative provisions can be presented, and perhaps a disapproved decree may be entered with further development of the record. If the district court refuses a decree because

it is presented too early in the litigation, it may be later approved, perhaps following a decisive vote by class members. Whatever the district court's reasons for refusing a decree, appeals of right from those refusals would encourage an endless string of appeals and destroy the district court's supervision of the action as contemplated by Fed.R. Civ.Proc. 23(e).

A rule allowing review after final judgment, on the other hand, facilitates the district court's supervision of the litigation and enhances appellate review. The district court's consideration and reconsideration of various proposed decrees—in whatever form and whenever presented during the litigation—can be reviewed effectively after final judgment. A single appellate review of all alternative proposals would be dispositive of the *Flinn* issue.[3] Also, after final judgment, important legal questions would rest on a firm factual setting with the parties arguing the importance of the law and facts as they appeared when the decree was proposed. Where alternative or revised decrees have been presented, the parties could advocate on appeal the alternative most favorable to their positions in light of the law and facts appearing when it was presented.. Such argument is vital when appellate courts must authoritatively opine about important unsettled legal issues of the highest social concern in the amorphous context of reviewing a trial

[3] For all our consideration of the merits of this decree, if we allowed the appeal our decision would not be dispositive. *See Coopers & Lybrand* v. *Livesay*, 98 S.Ct. at 2460-61; *Seigal* v. *Merrick*, 590 F.2d at 39. The ultimate composition of the decree would remain an open matter pending response by individual class members to the class notice. Although the named parties are bound to the terms of the decree as proposed, in fairness to class members, we think our approval of it would have to be conditioned upon acceptance of its terms by at least a majority of the members.

court's exercise of discretion.[4] In all, we think the admonition of Judge Clark is apt,

> A district judge's orders advancing a case to trial ought not to be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication. * * * I believe this an intolerable burden for us, an improper and uncertain interference with trial court discretion, and a confusing invitation to indiscriminate appeals in the future—all contrary to settled federal law against piecemeal appeals.

Peter Pan Fabrics, Inc. v. *Dixon Textile Corp.*, 280 F.2d 800, 805-06 (2nd Cir. 1960). (Judge Clark dissenting).

VI.

In conclusion, the district court's discretionary decision to send the parties to trial, in lieu of granting immediate injunctive relief before the facts are settled, is not a ruling of irreparable consequence. Plaintiffs may proceed to trial with no loss of either their claims for final injunctive relief or their right of appellate review of the *Flinn* issue. Short of going to trial, the parties may propose alternative decrees to the district court, one of which may be entered. Appellate review of the order is best effected following final judgment. Such review preserves the trial court's exclusive control over the progress of the litigation and facilitates its supervision of the class action.

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[4] As noted by the Supreme Court in *Coopers & Lybrand* v. *Livesay*, 98 S.Ct. at 2461, Congress wisely provided in § 1292(b) for appellate review of important legal issues before final judgment only as a matter of discretion by the courts involved. Such review is allowed with approval of both the district court and the court of appeals.

Therefore, we hold that the district court's order refusing entry of the proposed consent decree is not appealable, and, accordingly, the appeal is dismissed.

Appeal Dismissed.

WINTER, Circuit Judge, with whom HAYNSWORTH, Chief Judge, and BUTZNER, Circuit Judge, join, dissenting:

In this Title VII class action, the district court declined to approve and to enter a consent decree which the parties had negotiated in settlement of the action. Plaintiffs appeal. Unlike the majority, we think that the order denying approval of the settlement and declining to enter it was appealable. As to the merits, we conclude that in the main the district court abused its discretion in declining to approve and enter the decree. We would require that such approval be given, although we would authorize the district court to require a modification of the decree with respect to the notice to be given certain members of the subclass whose alleged rights are to be abandoned as part of the settlement.

We therefore respectfully dissent.

I.

This Title VII class action was brought against the employer, American Brands, Inc. (American) and Tobacco Workers International Union and its Local 182 (union) on behalf of black employees and black persons who sought employment at American's Richmond, Virginia, leaf department. The complaint contained general allegations that defendants denied equal opportunities for hiring, promotion, transfer and on-the-job training for blacks, thus restricting them to lower paying and less desirable jobs, that defendants pay lower wages to blacks for like work than

they pay to white employees, that the union has failed to represent blacks fairly, has acquiesced in discrimination against them and has entered into collective bargaining agreements intended to discriminate against them, and that the defendants have disciplined and discharged black employees solely because of their race.

After answers were filed, the parties engaged in extensive discovery for a period exceeding one year. The discovery included the taking of nineteen depositions and the analysis of boxes of written material tendered in response to some of the six sets of interrogatories. By March 1, 1977, the scope of the action was restricted; and on that date the district court, pursuant to F.R.Civ.P. 23(b)(2), certified a class consisting of:

1. All black persons, whether currently employed or not, who were seasonal employees of American Tobacco Company's Richmond Leaf Plant on or after September 9, 1972; and

2. All black persons who applied for seasonal employment at the American Tobacco Company's Richmond Leaf Plant at any time on or after September 9, 1972.

The facts, accepted by the district court for the purpose of deciding whether to approve and enter the decree, were that American operates the Richmond Leaf Department for the purpose of processing and storing leaf tobacco. It has two types of employees: seasonal, whose period of employment is between six and nine months each year, and regular, who are employed full-time for the entire year. The union has exclusive bargaining rights for all hourly-paid production unit positions.

American employs approximately 150 seasonal employees, *all* of whom, as of June 2, 1977, were black, and approximately 100 regular employees, of whom 66% were black. Plaintiffs are not aware of any white individuals who have ever been employed as seasonal employees.

Prior to September 1963, the regular job classifications of truck driver, watchman, maintenance storage, and boiler operator at the Leaf Plant were reserved for whites only. As of February 15, 1976, these positions were staffed as follows:

Position	*Whites*	*Blacks*
Truck Drivers	5	4
Watchmen	15	1
Maintenance Storage	1	0
Boiler Operators	0	3

Regular employees have the right to obtain any permanent position for which the union has bargaining rights within the Richmond Leaf Department. Seasonal employees have the right to obtain any seasonal position for which the union has bargaining rights within the Richmond Leaf Plant. Seasonal employees may transfer to positions in regular classifications only when no regular employee desires that position. Should the seasonal employee transfer to a regular position, he loses all of his seniority and is treated as a new hire for seniority purposes. Separate seniority rosters are maintained for regular and for seasonal employees.

When a seasonal employee transfers to a regular position, he is placed at the bottom of the regular seniority roster irrespective of the number of years he has worked as a seasonal employee with American. This loss of senior-

ity affects his status for promotions, demotions, lay-offs, recalls and vacations, and, in short, the principal terms and conditions of his employment.

Since 1971, the vast majority of applicants and new hires at all of American's locations in the Richmond area have been black, as indicated by the following chart:

	Applicants		*New Hires*	
Year	*Blacks*	*Whites*	*Blacks*	*Whites*
1971	97	1	88	1
1972	118	5	97	2
1973	94	4	93	1
1974	71	7	64	2
1975	77	3	22	2

The racial composition of the production unit at the Richmond Leaf Department is as follows:

	Regular Employees		*Seasonal Employees*	
Year	*Whites*	*Blacks*	*Whites*	*Blacks*
1968	41	52	—	116
1970	40	59	—	175
1973	40	56	—	176
1976	37	57	—	135

Of the 35 supervisory positions at American's Richmond Leaf Department as of April 5, 1976, seven, or 20% were filled by blacks. Of the 229 persons in hourly paid production unit jobs at the Richmond Leaf Department in that same year, 192, or 84% were black.

The consent decree was negotiated by counsel during the months of February and March, 1977. Agreement was

reached less than a week before the trial of the case was scheduled to begin. Counsel were all thoroughly experienced in Title VII class action litigation, including, but not limited to, such suits in the tobacco industry.

The proposed consent decree contained five substantive provisions:

1. Every current and future regular hourly-paid production employee would be credited with seniority for actual time worked as a seasonal employee. Thus, seasonal employees would not lose seasonal seniority by transferring to regular positions and the seniority deterrence to transfers from seasonal to regular employment would be removed.

2. Regular employees who successfully served a probationary period as seasonal employees would not be required to serve another probationary period to become eligible for medical and sick benefits. Again, a deterrence to transfers from seasonal to regular employment was removed.

3. In the event that vacancies in hourly-paid permanent production job classifications are not filled by regular production employees, seasonal production employees will be given the opportunity to fill them before there is hiring from the outside. This gives seasonal employees the opportunity to bid on vacancies in regular production jobs, some of which were at one time reserved for whites only, before any outside hiring.

4. Seasonal employees shall have the opportunity to bid on vacancies in the watchman job classification prior to hiring from the outside. This provision duplicates "3," except that it is restricted to the watchman classi-

fication. The watchman classification was probably given separate treatment because as of February 15, 1976, there had been less black penetration than in any other formerly all-white classification.

5. A goal is set for the Leaf Department for the filling of Foreman and Assistant Foreman supervisory positions with qualified blacks until one-third of such positions are filled with blacks. The date of December 31, 1980 is fixed as the date for accomplishment of this goal.

With respect to monetary claims of individual members of the class, the consent decree recites that there was no discriminatory hiring and therefore the members of Class 2 (black persons who applied for seasonal employment on or after September 9, 1972, but were not hired) are entitled to no monetary relief. By contrast, those falling into Class 1 may be entitled to monetary relief and the procedures for proving and asserting a claim are specified. Notice of the proposed decree will be given to members of Class 1 with an opportunity for them to object before the decree becomes final. No notice is to be given to members of Class 2 notwithstanding that the decree adversely adjudicates their claim to monetary relief.

After all counsel tendered the consent decree, the district court conferred with counsel and required them to file memoranda of facts and of law in support of the decree. After the memoranda were filed and considered, the district court filed its memorandum disapproving the consent decree and declining to enter it.

The major premise of the district court's memorandum was that it should neither approve nor enter a consent decree that perpetuates, promulgates or acquiesces in dis-

crimination on the basis of race. The district court then made a general review of the decided cases construing Title VII and some of its legislative history; and after deducing what it thought were applicable general principles, it turned to a consideration of the five substantive provisions of the proposed decree. It disapproved of giving seniority credit for seasonal employment, because seasonal employees have always been black; and therefore the effect of giving seniority credit for seasonal employment will be to give preferential treatment on the basis of race in violation of Title VII. For the same reason, it disapproved of the provision excusing regular employees from a probationary period when they had successfully served a probationary period as seasonal employees. Similarly, the provisions giving seasonal employees a right to bid on vacancies in hourly-paid permanent production job classifications and the watchman classification before hiring from the outside were disapproved as illegal preferential treatment of blacks solely on the basis of race since only blacks were seasonal employees. Finally, the district court construed the goal for filling the supervisory force as an illegal racial quota and disapproved it.

II.

We consider first the question of our jurisdiction. We do so in the light of the congressionally articulate policy to redress discrimination in employment "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). This policy, in our view, favors settlement of claims of discrimination in employment. When, as here, the parties' settlement of their dispute has been rejected by the district court, there is a compelling reason to review the propriety of the rejection if review is arguably permitted under established appellate jurisdiction.

The order from which this appeal is taken is interlocutory. We agree with the majority that there is no right to appeal every interlocutory decision of a district court. However, there are exceptions to this general rule, both judge-made, i.e., *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and statutory. The significant exception to be considered here is that contained in 28 U.S.C. § 1292(a)(1):

> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, *refusing* or dissolving *injunctions,* or refusing to dissolve or modify injunctions. . . . (Emphasis added.)

It is our view that the order declining to approve the settlement was an order refusing an injunction. As we have earlier set out, the settlement would have required American and the union to take a number of affirmative steps. It would have required that hourly-paid production employees be given seniority for service as seasonal employees; it would have required that such employees be eligible for medical and sick benefits without serving another probationary period; it would have given seasonal employees a preference for employment in certain permanent positions; it would have given seasonal employees a preference over outsiders in bidding for vacancies in the watchman classification; and it would have fixed a goal in the hiring of qualified blacks in the positions of Foreman and Assistant Foreman. The parties themselves termed the proposed consent decree as one "enjoining" American and the union from discriminating against black employees and titled the

five affirmative actions that we have described as "Injunctive Relief For the Class."

In *Lewis* v. *Tobacco Workers' International Union*, 577 F.2d 1135 (4 Cir. 1978), *cert. denied*, 439 U.S. 1089, 99 S.Ct. 871, 59 L.Ed.2d 56 (1979), a panel of the court held that an interlocutory order in an employment discrimination case which adopted guidelines proposed by plaintiffs was appealable. Those guidelines required the employer and the union to supply a list of members eligible for back pay, required them to pay interim attorneys' fees, required the development of job descriptions, required that certain transfers of employees not be limited, required the hiring of permanent and seasonal employees, required that employees be advised of vacancies, and required that employment applications remain viable for not less than one year. In rejecting the argument that the order was not appealable because it was not a final order granting relief, the court said:

> We believe the guidelines, requiring the defendants to act in some instances and forbidding them to act in others, to be an injunction. We do not agree with the plaintiffs' position that the guidelines, although requiring present affirmative action or restraint, are yet unappealable. (Footnote eliminated.)

577 F.2d at 1139.

Surely *Lewis* was correctly decided, and surely it is indistinguishable from the instant case. The proposed consent decree was an injunction,[1] and had it been entered it would have been appealable under *Lewis*. The refusal

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[1] We note that even the majority concedes that the consent decree was an injunction. "Here, injunctive relief was not finally denied; it was merely not granted at this stage in the proceedings." Majority op. p. 423.

to enter the proposed consent decree is equally appealable, because § 1292(a)(1) authorizes an appeal from an interlocutory order "refusing" an injunction.

We are at a loss to understand why the majority fails to conclude that *Lewis* decides this case and why the majority holds the order in the instant case non-appealable. Certainly the holding in *Seigal* v. *Merrick,* 590 F.2d 35 (2 Cir. 1978), does not support that result. *Seigal* concerned the settlement of a derivative stockholders' suit. The granting of stock options in exchange for certain cash consideration bears little resemblance to the entry of an injunction. Indeed, in *Seigal* the only issue litigated was whether the order refusing approval of the settlement was appealable under 28 U.S.C. § 1291 under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp., supra.*[2] No claim was made that, as here, the order was appealable under 28 U.S.C. § 1292(a)(1).

Nor do we think that *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978), holding that pretrial denial of class certification in a Title VII case is not appealable under § 1292(a)(1), controls here. The rationale of that case is that the order denying certification "could be reviewed both prior to and after final judgment; it did not affect the merits of petitioner's own claim; and it did not pass on the legal sufficiency of any claims for injunctive relief." *Id.* at 480-81, 98 S.Ct. at 2453. By contrast, if the consent decree in the instant case is not approved now, as a practical matter

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[2] It should be noted that, in *Norman* v. *McKee,* 431 F.2d 769 (9 Cir. 1970), *cert. denied,* 401 U.S. 912, 91 S.Ct. 879, 27 L.Ed.2d 811 (1971), the Ninth Circuit reached the opposite result and held that the refusal to enter a settlement of a derivative stockholders' suit was appealable.

the propriety of the proposed settlement will not be raised again either in the district court or before us. The consent decree, if entered, would settle finally the rights of the parties, subject only to possible modification at the instance of a dissatisfied member of the class; and, notwithstanding the standard recital that defendants disclaimed liability, it would in actuality hold them to have violated Title VII.

Similarly, a holding that the denial of a motion for summary judgment, which if granted would include injunctive relief, is not appealable, *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 87 S.Ct. 193, 17 L.Ed.2d 23 (1966), does not decide this case. "[T]he denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial." *Id.* at 25, 87 S.Ct. at 195. By contrast, the order appealed from in the instant case does much more; in rejecting the consent decree, the district court relied on conclusions adverse to plaintiffs' claims on the merits—conclusions which plaintiffs now ask us to review. Nor is the instant case decided by *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976). There, the district court granted partial summary judgment as to liability in a Title VII employment case, but before an actual injunction was formulated and entered, the employer appealed. The Court held that the order was not appealable under § 1292(a)(1) since no injunction had been issued, nor had an injunction been refused. Significantly, it added that "had [the district court] granted injunctive relief but had not ruled on respondents' other requests for relief, this interlocutory order would have been

appealable under §1292(a)(1)." *Id.* at 744, 96 S.Ct. at 1207.

Thus, we conclude that we have and should exercise appellate jurisdiction.

III.

Because we would hold that we possess and should exercise appellate jurisdiction, we are brought to the merits of the case.

The law of this circuit with reference to the function of the district court in approving or disapproving a settlement of Title VII sex discrimination litigation, as well as our function on appeal, was settled in *Flinn* v. *FMC Corporation,* 528 F.2d 1169 (4 Cir. 1975), *cert. denied,* 424 U.S. 969, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976). We think that the same standards apply to settlement of Title VII race discrimination litigation.

In *Flinn,* to summarize Judge Russell's detailed and scholarly opinion, we said that the most important factor that the district court must consider is the strength of the plaintiffs' claims on the merits and that, in making that evaluation, the district court should consider the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement and the experience of plaintiffs' counsel who negotiated the settlement. These elements are important, Judge Russell wrote, because the completion of discovery ordinarily permits a reasonable evaluation of the merits of a claim, and the opinion of competent counsel, absent a showing of collusion and bad faith, is entitled to great weight. Also to be considered is the attitude of the class members and whether they favor or oppose the settlement. Judge Russell cautioned that while the adequacy of a settlement should

be appraised, the district court should not turn its consideration of the settlement into a trial or rehearsal of the trial or make dispositive conclusions on the unsettled legal issues in the case. Finally, Judge Russell called attention to the legislative intent to encourage settlements, expressed in Title VII. 528 F.2d at 1172-74.

Although our review is limited to determining whether the district court abused its discretion in the action that it took, 528 F.2d at 1172, we are persuaded that in the instant case there was an abuse of discretion, in disapproving the settlement, except in one small particular with respect to notice to members of Class 2 plaintiffs whose rights were being adjudicated adversely to them. We reach this conclusion from a consideration of the factors identified in *Flinn*.

There can be no doubt that counsel for all parties to this litigation are highly competent and experienced lawyers with substantial experience in dealing with Title VII racial discrimination employment cases. They reached a settlement on the eve of trial after all reasonable discovery had been completed and after lengthy negotiations. There is not the slightest basis to suggest that they negotiated collusively or in bad faith. The fact that they, who know the case best and know their respective clients' strengths and weaknesses with respect to the issues, have agreed to the settlement and recommend it to the court is entitled to very great weight.

The attitude of members of the class is as yet unknown since the decree will not be exhibited to them until it is entered. But the entry will be in effect an order *nisi* and the district court will have full opportunity to assess the objections, if any, of the members of *both* classes and to enter such further orders as are proper.

Of course the recommendations of even experienced, competent counsel will not suffice to warrant the entry of a consent decree if its terms depart markedly from the plaintiffs' case. We do not disagree with the district court's major premise that a consent decree should not be entered which is in violation of law, but it is manifest since the decision in *United Steelworkers of America* v. *Weber,* —— U.S. ——, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), which was announced after the submission of the case to the in banc court, that the proposed consent decree does not fall into that category. *Weber* unequivocally held that a private, voluntary, race-conscious affirmative action plan which reserved for black employees 50% of the openings in an in-plant craft training program until the percentage of black craft workers in the plant is commensurate with the percentage of blacks in the local labor force did not violate Title VII. Since the plan was adopted by private parties, there was no question presented of an alleged violation of the Equal Protection Clause of the Constitution.

In the light of *Weber,* we would have little difficulty in holding that, by voluntary agreement, seasonal employees, all of whom were black, could be given seniority credit for the time that they worked as seasonal employees as well as credit toward their eligibility for medical and sick benefits, that they could be given preference in bidding for vacancies in hourly-paid permanent production job classifications, that they could be given preference in bidding for vacancies in the watchman job classification, and that a goal to fill supervisory positions in the Leaf Department with qualified blacks until one-third of the positions are filled with blacks could be set, all without violating Title VII.

We do not fault the district court for not anticipating *Weber*. But now that *Weber* has been decided, it is obvious that the district court fell into error as a result of its failure to recognize that the parties agreed to the substantive provisions of the consent decree to redress past discrimination and the present effects of past discrimination. Remedial steps of the type employed are legal and proper to redress discrimination. They were included not to favor plaintiffs because they are black but to make them equal by undoing the unlawful discriminations which had been practiced against them because they were black. This is the whole purpose of Title VII and of this lawsuit. The fact that the consent decree contained language to the effect that American and the union deny "discriminatory conduct," while plaintiffs similarly withhold any admission that any of American's employment practices are legal, should not hide the fact that plaintiffs, arguably at least, have a cause of action under Title VII for racial discrimination in employment and although American and the union, arguably at least, have good defenses, the parties, consistent with the intent of Title VII, should be allowed to compose their differences and reach an amicable settlement of the matter. Disclaimers of liability and disclaimers of admissions of legality are not uncommon in settlement agreements, as well as in consent decrees. A ruling that litigation may not be settled unless a party formally admits liability, or formally concedes legality, or a court determines liability or a lack thereof, would defeat the general policy of the law to foster settlements since the very purpose of a settlement is usually to avoid an adjudication or a concession of rights. Certainly it would ban settlements in

Title VII cases in violation of congressional intent where the purpose of the settlement is to avoid an adjudication.

Since Title VII encourages settlements and since the settlement embodied in the proposed consent decree was one negotiated by competent, experienced counsel in full possession of all discoverable facts, and since we perceive no unfairness or manifest illegality in the manner in which the parties propose to compose their differences, we think that it was an abuse of discretion for the district court to decline to approve and to refuse to enter the consent decree.[3]

IV.

We would therefore assert jurisdiction over this appeal, reverse the judgment of the district court, and direct it to enter the proposed decree, modified only with respect to notice to members of Class 2, *see* note 3 *supra*. Because

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[3] We think that the proposed decree should be modified in one minor respect. The consent decree provides that after its entry notice of its terms will be given to all members of Class 1 (black persons, whether currently employed or not, who were seasonal employees at any time after September 9, 1972), by posting on American's bulletin boards and by mail to each person included in the class. The notice must advise every class member that he has a right to object to the decree, the time in which to lodge an objection and the place to file written objections. Similar notice is not required to be given to members of Class 2 (black persons who sought but did not obtain seasonal employment after September 9, 1972), although the decree provides that they "are not entitled to assert claims for monetary relief."

We think that the consent decree should give the same notice to members of Class 2 as will be given to members of Class 1. If, notice to members of Class 2 having been given, an objection to the decree, having arguable merit, is lodged, there will be need for a new representative of the class. *See Goodman* v. *Schlesinger*, 584 F.2d 1325 (4 Cir. 1978), and *Cox* v. *Babcock & Wilcox*, 471 F.2d 13 (4 Cir. 1972).

the majority finds that it lacks jurisdiction over this appeal, we are constrained to add a further comment. The majority's jurisdictional decision in no way touches the merits or approves the action taken by the district court. Moreover, it is grounded firmly on the fact that the order of the district court refusing to enter the consent decree is not a final judgment:

> Under the *Flinn* analysis, the named parties may present a proposed decree to the district court in any form and at any stage in the proceedings. If one decree is refused another may be proposed. At any time the district court can reconsider its refusal to enter a decree.

Majority op. at 424.

> We agree that the district court has the power to reconsider its order. Further, we believe that *Weber* so undercuts the theory on which the district court declined to enter the consent decree that, when the case is returned to the district court, it may well, on its own motion or at the instance of counsel for plaintiffs, conclude to reconsider its ruling in light of *Weber*. If reconsidered, we feel confident that the district court will conclude that Title VII presents no bar to approval of the consent decree.

Opinion of the District Court

September 14, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RICHMOND, VIRGINIA

No. 77-2260

FRANK L. CARSON, LAWRENCE HATCHER, STUART E. MINES,

Appellants,

v.

AMERICAN BRANDS INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL, TOBACCO WORKERS INTERNATIONAL UNION,

Appellees.

This Opinion is recorded at 446 F. Supp. 780.

MEMORANDUM

WARRINER, *District Judge.*

I

Plaintiffs brought this class action against the above-named defendants under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* as amended, 42 U.S.C. § 1981 and the Fourteenth Amendment. Jurisdiction is invoked pursuant to 42 U.S.C. § 2000e 5(f) and 28 U.S.C. § 1343(4).

Negotiations in an attempt to settle the issues raised by the complaint have resulted in a proposed Consent

Decree which the parties requested the Court to enter at the final pretrial conference on 1 April 1977. At that conference, the Court expressed concern that certain provisions of the Decree might be violative of the law and that provisions of the Decree would affect parties other than those before the Court. The Court noted that the parties were jointly seeking entry of the Decree and to that extent were no longer in an adversary posture. The Court requested counsel to brief the issues of concern. The briefs having been filed the Court must now decide whether or not it is just and proper and in accordance with the law to enter the Decree.

II

Plaintiffs have included a statement of facts in their brief in support of the proposed Consent Decree. For this purpose only, we accept these facts to be true as follows:

The defendant American Brands, Inc. (hereinafter referred to as the "Company"), operates the Richmond Leaf Department of the American Tobacco Company in Richmond, Virginia, for the purpose of processing and storing leaf tobacco. The defendant Local 182 Tobacco Workers International Union has exclusive bargaining rights for the establishment of wage rates and other terms and conditions of employment for all hourly paid production unit positions at the Richmond Leaf Department. The defendant Tobacco Workers International Union is a national organization consisting of local unions, including Local 182.

The plaintiffs are present and former black seasonal employees at the Richmond Leaf Department and held jobs under the jurisdiction of Local 182, TWIU, during their employment. As seasonal employees, the plaintiffs all worked at the Richmond Leaf Plan an average of six

months each year. Regular employees worked at this same facility all year.

The Company employs approximately 150 seasonal employees, *all* of whom at the present time are black, and approximately 100 regular employees, of whom 66% are black. Plaintiffs are not aware of any white individuals who have ever been employed as seasonal employees at the Company's Richmond Leaf Plant.

Prior to September 1963, the regular job classifications of truck driver, watchman, maintenance, storage, and boiler operator at the Leaf Plant were reserved for whites only. As of 15 February 1976 these positions were staffed as follows:

Position	*Whites*	*Blacks*
Truck Drivers	5	4
Watchmen	15	1
Maintenance Storage	1	0
Boiler Operators	0	3

Regular employees have the right to obtain any permanent position for which the TWIU has bargaining rights within the Richmond Leaf Department. Seasonal employees have the right to obtain any seasonal position for which the TWIU has bargaining rights within the Richmond Leaf Plant. Seasonal employees may transfer to positions in regular classifications only when no regular employee desires that position. Should the seasonal employee transfer to a regular position, he loses all of his seniority and is treated as a new hire for seniority purposes. Separate seniority rosters are maintained for regular and for seasonal employees.

When a seasonal employee transfers to a regular position he is placed at the bottom of the regular seniority

roster irrespective of the number of years he has worked as a seasonal employee with the Company. This loss of seniority affects his status for promotions, demotions, lay-offs, recalls and vacations, and, in short, the principal terms and conditions of his employment.

Since 1971, the vast majority of applicants and new hires at all of the Company's locations in the Richmond area have been black, as indicated by the following chart:

Year	*Applicants*		*New Hires*	
	Blacks	*Whites*	*Blacks*	*Whites*
1971	97	1	88	1
1972	118	5	97	2
1973	94	4	93	1
1974	71	7	64	2
1975	77	3	22	2

The racial composition of the production unit at the Richmond Leaf Department is as follows:

Year	*Regular Employees*		*Seasonal Employees*	
	Whites	*Blacks*	*Whites*	*Blacks*
1968	41	52	—	116
1970	40	59	—	175
1973	40	56	—	176
1976	37	57	—	135

Of the 35 supervisory positions at the Company's Richmond Leaf Department as of 5 April 1976, seven, or 20%, were filled by blacks. Of the 229 persons in hourly paid production unit jobs at the Richmond Leaf Department in that same year, 192, or 84% were black.

III

In the proposed Consent Decree defendants "expressly deny any violation of . . . any . . . equal employment law, regulation, or order." Plaintiffs conversely state that "consent to this Decree does not constitute a finding or admission that any of the employment practices of . . . [defendants] are lawful." The proposed Decree further states that "the Court finds from the evidence previously filed in the form of answers to interrogatories that there are no discriminatory hiring practices at the Richmond Leaf Department."

In light of the facts outlined above, the foregoing provisions, and the applicable law, the Court questioned the propriety of the following provisions of the proposed Consent Decree:

> In full and final settlement of any and all claims for injunctive relief alleged in the Complaint, the parties agree to the following:
>
> 1. For the purposes of determining eligibility for vacations and for promotions, demotions, lay-offs and recalls, every current and future regular hourly paid production employee of the Richmond Leaf Department will be credited with actual time worked as a seasonal employee commencing with the date of hire of the last period of continuous employment as a seasonal employee in accordance with Section 1 of Article 7 of the current collective bargaining agreement governing seasonal employees. The combined total of such seasonal and regular employment will apply toward service requirements for vacations, and for promotions, demotions, lay-offs and recalls.

2. Regular employees who have served the probationary period as a seasonal employee during the last period of his or her continuous seasonal employment at Leaf prior to being transferred to regular Leaf employment will become eligible for medical benefits and sick benefits immediately upon such transfer to regular employment.

3. In the event that vacancies in hourly paid permanent production job classifications at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production employees will be given the opportunity to fill such vacancies prior to hiring from the outside.

4. In the event that vacanies in the job classification, Watchman, at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production employees will be given the opportunity to fill such vacancies prior to hiring from the outside.

5. The Richmond Leaf Department adopts a goal of filling the production supervisory positions of Foreman and Assistant Foreman with qualified blacks until the percentage of blacks in such postions equals ⅓ of the total of such positions. The date of December 31, 1980 is hereby established for the accomplishment of this goal.

IV

Before discussing these provisions specifically, a general discussion of what this Court perceives to be the controlling law is appropriate.

Plaintiffs based this suit on Title VII, Section 1981 and the Fourteenth Amendment. As defendants herein are private parties, the Court does not find the precepts of the Fourteenth Amendment to be applicable *per se*. But the guarantees of the Equal Protection clause against State action by the Fourteenth Amendment nevertheless are afforded plaintiffs by Title VII and Section 1981 which, with respect to private parties defendant, have their underpinnings in the Thirteenth Amendment. This Court is also cognizant that the Supreme Court of the United States has read the guarantees of the Equal Protection clause into the Due Process clause of the Fifth Amendment protecting against arbitrary and capricious[1] federal action.

Thus, the Fifth Amendment may well protect citizens against arbitrary and capricious federal action in the form of a federal court Consent Decree that would place a federal stamp of approval, with the full force and effect of contempt proceedings, to what would otherwise be a mere agreement between private parties. *See Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1947). In sum, we opinion that the mandates of the United States Constition as well as the statutes invoked by plaintiffs require us to insure that this Court plays no role in perpetuating, promulgating or acquiescing in improper discrimination on the basis of race.

V

Keeping the above in mind, we shall focus on the law of Title VII as this statute speaks specifically to the area

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[1] *See e.g., Richardson* v. *Belcher*, 404 U.S. 78, 81-82, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); *Flemming* v. *Nestor*, 383 U.S. 603, 612, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Bolling* v. *Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1934).

of concern herein, that is, discriminatory employment practices.

Title VII states in pertinent part that it is unlawful:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [42 U.S.C. § 2000e-2(a)].

The provisions of Subsection (j) read as follows:

> (j) *Preferential treatment not required on account of numerical or percentage imbalance.* Nothing contained in this title [42 U.S.C.S. §§ 2000e—2000e-17] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted

> to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Title VII plainly and distinctly prohibits racial discrimination in any and all aspects of employment practices including but not limited to recruitment, promotions, seniority and benefits. The language clearly prohibits discrimination against whites as well as blacks on account of race and clearly makes no exception for alleged benign motives such as rectifying the effects of past discrimination. Indeed, Subsection (j) explicitly states that preferential treatment is not required to rectify racial imbalance. To be sure, Title VII does not exclude use of extraordinary measures to make those individuals who actually suffer from the results of past or present discrimination whole, but such action is more aptly characterized as equitable, not preferential, treatment. And even in this context, the courts have been careful to minimize whatever adverse effects may result with respect to innocent third parties.

The legislative history of Title VII clearly supports what this Court understands to be its clear and unequivocal mandate. In response to a charge that the Title VII appeared to force employers to grant preferential treatment, Senator Harrison Williams retorted:

> Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial

> discrimination, just as much as a "white only" employment policy. Both forms of discrimination are prohibited by Title VII of this Act. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job. Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race over another? *Equality can have only one meaning, and that meaning is self-evident to reasonable men.* [*Legislative History of Title VII and XI of the Civil Rights Act of 1964, United States Equal Employment Opportunity Commission, U.S. Government Printing Office, 1969, page 3189.*]

Senator Williams' understanding as above expressed in advocating passage of Title VII was shared by Senators Clark and Case:

> There is no requirement that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever the imbalance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. [110 Cong.Rec. 7213, April 8, 1964]

Further, at the behest of the bill's sponsors, the Department of Justice submitted a memorandum stating:

> Finally, it has been asserted that Title VII would impose a requirement of "racial balance." This is incorrect. There is no provision, either in Title VII or in any other part of this bill that requires or authorizes any federal agency or federal court to require preferential treatment for any individual group for the purpose of achieving racial balance.
>
> No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. [110 Cong.Rec. 7207, April 8, 1964.]

Neither the Supreme Court nor the Fourth Circuit has dealt squarely with the question of the legality of preference and/or quotas under Title VII. However, both Courts have discussed the issue in dicta. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) the Supreme Court stated:

> Congress did not intend by Title VII to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. [401 U.S. at 430-431, 91 S.Ct. at 853].

The Supreme Court, in the more recent decision of *McDonald* v. *Santa Fe Transportation Co.*, 423 U.S. 923, 96 S.Ct. 264, 46 L.Ed.2d 248 (1976), made clear, though not in the factual context of an affirmative action program, that Title VII's protection from racial discrimination applied to whites as well as blacks. Close in time to *McDonald,* the Court in *Franks* v. *Bowman Transportation Co.*, 423 U.S. 814, 96 S.Ct. 25, 46 L.Ed.2d 32 (1976) did award constructive seniority and back pay to remedy racial discrimination against blacks and this remedy may have adversely affected seniority rights of innocent white employees. However, this relief was unequivocally restricted to individual, identifiable, persons who were otherwise qualified for the positions they sought but had been denied on account of race.

Similarly, the Fourth Circuit has consistently limited remedial relief under Title VII to actual persons who were victims of unlawful discrimination, thereby minimizing disruption of the working lives and expectations of other innocent employees.

In *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir.) *cert. denied* 425 U.S. 935, 96 S.Ct. 1666, 48 L.Ed.2d 176 (1976), a case which appears to be factually close to this one, the Court, with some modification, affirmed the district court's decree. *Russell* was a class action brought by black employees against their employer and union for engaging in racially discriminatory employment practices. The discrimination involved three departments of the company: Leaf, Prefabrication and Fabrication. The Leaf Department was located in Rockingham County and the Prefabrication and Fabrication Departments were housed in the Reidsville plant. Each department had a separate seniority roster. The district court found, *inter alia,* that

defendant's discriminatorily preserved higher-paying jobs in the Fabrication Department for white employees after enactment of Title VII. The Circuit Court clarified this finding by holding that the disparity of treatment of the employees at the Leaf Department and the Prefabrication Department was also a product of this discriminatory design:

> If Branch and Leaf are both parts of the same operation, this case presents a straightforward application of the well-accepted principle that discriminatory hiring in departments of a business may be remedied by requiring the company to allow transfers between departments, based on plant-wide seniority. *See e. g. Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968) . . . [Hence] we conclude that regular and seasonal black employees at Leaf *who were hired before the company eliminated discrimination* at fabrication should be permitted to transfer to that department as permanent vacancies occur *in jobs they can perform.* Further, they should receive the training for which they qualify. A transferee's new departmental seniority should be computed from his employment seniority date. The class of employees entitled to back pay should also be enlarged to include Leaf employees. [528 F.2d at 362-364] [Emphasis added.]

Of particular significance, the Circuit Court affirmed the district court's disallowance of what would have amounted to preferential treatment on the basis of race to those black employees among the class of plaintiffs who were not victims of discrimination:

> Regular and seasonal Leaf employees also seek entry into the prefabrication department, and many seasonal employees seek regular employment in Leaf on the basis of their company seniority. The district court, finding no racial discrimination in hiring at prefabrication and Leaf, denied their requests. We affirm because the Act does not oblige a company to allow black employees to transfer into departments that were always open to black applicants without discrimination. *United States* v. *Chesapeake & Ohio Ry. Co.*, 471 F.2d 582, 588, 593 (4th Cir. 1972); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971). [528 F.2d at 364.]

The most recent Fourth Circuit case in this area is *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976). This Court has discussed its reading of that case at some length in *Cramer* v. *Virginia Commonwealth University*, 415 F.Supp. 673, 679-680 (E.D.Va.1976). Suffice it to say that *Patterson* did not hold that Title VII allows preferential treatment solely on the basis of race to compensate for unlawful past discrimination. More important, insofar as *Patterson* relates to the facts herein, it states that:

> [Title VII] plainly bans the use of preferential hiring to change a company's racial imbalance that cannot be attributed to unlawful discrimination. [535 F.2d at 273].

Title VII, by its own terms, does not *require* preferential treatment to rectify racial imbalance. This language may be interpreted to mean that, although permissible, it is not mandated. *Patterson* states in no uncertain terms that

preferential treatment is banned absent proof of discrimination. As in *Russell* the Court in *Patterson* carefully tailored the relief to cover only actual victims of discrimination. *See also, United States* v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972).

VI

Since Executive Order 11246 is also related to this area, discusion on this point is warranted.

The Court has previously discussed this issue, citing appropriate authority, in *Cramer* v. *Virginia Commonwealth University*, 415 F.Supp. 673, 680-681 (E.D.Va.1976) holding that where Executive Order 11246 is inconsistent with Title VII it is superseded thereby. This Court must additionally note however that the pertinent language of Executive Order 11246 is clearly consistent with the plain language of Title VII:

> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be

provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

It is rather the regulations adopted by the Secretary of Labor pursuant to Executive Order 11246 that may be conflicting, in our opinion, with both Title VII and Executive Order 11246. The Secretary's regulations require that contractors develop written affirmative action plans which shall "provide in detail for specific steps to guarantee equal employment opportunity keyed to problems and needs of members of minority groups, including, when there are deficiencies, the devolopment of specific goals and time tables for prompt achievement of full and equal employment opportunity." [41 C.F.R. 60 1.40(a) (1970)]. Insofar as the above quoted regulation serves as an amorphous and euphemistic mandate requiring preferential treatment and imposition of quotas solely on the basis of race, it contravenes the letter and spirit of Title VII. As Title VII supersedes contravening Executive Orders, *a fortiori,* it *supersedes* federal regulations represented to be adopted pursuant to such orders.

VII

Lastly, before examining the provisions in question, something should be said about the nature and legal significance of consent decrees in Title VII class actions.

A recent Fifth Circuit case, *Myers* v. *Gilman Paper Corp.,* 544 F.2d 837 (1977), affords some insight in this area. *Myers* was a Title VII class action brought against a company and union by black employees and former employees who sought affirmative relief for alleged racial discrimination in employment, promotions and transfers. The district court found the union liable on the merits. In

addition the Court entered and approved a consent decree between plaintiffs and the company. On appeal by the union, the Circuit Court held, *inter alia,* that the district court could not approve a consent decree negotiated between plaintiffs and the company that would allow the substitution of a solution for past discrimination in place of that achieved through collective bargaining unless it first determined that the collectively bargained solution either violated Title VII or was inadequate to cure the effects of past discrimination. 544 F.2d at 858-859.

In the course of its memorandum the Court made a number of pertinent remarks. It noted that "[b]efore a court can grant any relief it must find that the defendants engaged in the unlawful employment practice alleged in the complaint" [544 F.2d at 854]. It further made clear "that before a district court can modify seniority provisions [by consent decree or otherwise] there must be a challenge by the plaintiffs to the present provisions and a finding by the court that the present provisions still perpetuate discriminatory effects of prior action." [544 F.2d at 855].

Myers is not on all fours with this case particularly in that the union herein has consented to the decree in question, but *Myers* is sufficiently analogous to be of some import. First, and basic, consent decrees, although looked upon favorably by the courts, are not immune from scrutiny in terms of propriety and legality. This principle is especially true in class actions where the effect of the relief usually has widespread and considerable impact both within and outside the class. For good reason Rule 23(e) of the Federal Rules of Civil Procedure requires that "a class action shall not be dismissed or compromised without the approval of the court . . . ." Further, *Myers*

provides us with the foregoing guidelines in deciding whether or not to grant this approval in a Title VII context.

VIII

With the foregoing review of the law, the Court will consider the several provisions of the proposed Consent Decree.

Provision I of the Decree provides that current and future employees who were, or are to be, employed as seasonal workers at the Richmond Leaf Plant shall be credited with seniority for actual time worked at the plant from the beginning of their employment. Since the pool of employees benefiting from this provision, that is seasonal employees, has been traditionally and are now all black, it appears that benefits are being bestowed on the basis of race. Preferential treatment on the basis of race—any race—violates the Constitution and Title VII. It cannot be countenanced by a court sworn not to subvert but to uphold the law. To be sure, legitimate nonracial business reasons may underlie such a decision. But so also, and more likely in this case, could illegitimate racial considerations. If the reason is the former no decree is required. If the reason is the latter no decree is permitted.

Plaintiffs, in their brief in support of the proposed Consent Decree, say that the relief in Provision I is "exactly the same relief" granted in *Russell* v. *American Tobacco Co., supra.* This assessment is incorrect. There are two paramount distinctions between *Russell* and the instant case: (1) in *Russell* the Court found present discrimination and present effects of past discrimination; (2) the *Russell* Court carefully tailored the relief in an effort to make whole the actual victims.

In the proposed Consent Decree the defendants "expressly deny . . . any unlawful or discriminatory conduct." Plaintiffs state that they make no "admission" that defendant's conduct, with the exception of present hiring practices, is "lawful." This dichotomy does not create any factual basis upon which relief may be granted. Plaintiff does not, by these words, even deny defendants' assertion.

But assuming for the moment that there is evidence of present discrimination or of the present effects of past discrimination, Provision I is still not in line with *Russell*. The *Russell* Court devised an equitable solution to effect relief for actual victims of discrimination. The relief was not granted to employees because they were black but because they were actual, identifiable, victims of racial discrimination. Indeed, that Court refused relief to certain blacks where no evidence existed that they had suffered from racial discrimination. Contrawise, the parties herein have agreed to allow seemingly preferential treatment for "current and future" seasonal employees not because they are victims of racial discrimination, but because those current employees are black and those future employees will almost surely be black. There was no apparent consideration given to whether or not the preferred employees have been, are, or would be subject to racial discrimination. In short, the considerations which were the essence of *Russell* are absent here.

Provision II would allow all seasonal employees who have already served a probationary period as a seasonal employee to avoid having to serve the additional probationary period as a regular employee that would otherwise be required as a condition precedent to eligibility for medical benefits. The Court has the same concern with this provision as it does with Provision I. If this is a business

decision it's none of the Court's business. If it is proposed as relief for blacks it is unlawful as there is no showing that the so-called relief applies and is limited to, victims of racial discrimination and is reasonably related to making such victims whole.

Provisions III and IV are somewhat similar in purpose and effect and may be treated together. Provision III allows seasonal employees to transfer to full time positions, some of which were reserved at one time for whites only, as vacancies occur. Provision IV parallels III but specifically includes "Watchman" classification because the company has a separate eligibility list for that position. Since, as mentioned, the pool from which hires shall be made (seasonal workers) is all black, it is clear that "hiring from the pool" is simply another way of saying "hire black." To reiterate, if defendant chooses to hire from its seasonal workers *because* they are seasonal employees it presumably has a right to do so, but it has no right to a court decree requiring that it do so thus protecting it from claims that the facially neutral procedure was a pretext for preferring blacks over whites in hiring.[2]

Again, plaintiffs say that similar relief was granted in *Russell.* We find nothing in *Russell* to indicate that the class of plaintiffs therein were to be given preferential treatment in hiring over outsiders, but in any event, the foregoing distinctions mentioned with regard to Provisions I and II are applicable here. Plaintiffs admit in their brief that they "have not found any evidence of discriminatory hiring for positions in the hourly production unit." They instead speak of present effects of past discrimination but none of the parties explicate upon these effects, if any,

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[2] But *see McAleer* v. *American Telephone & Telegraph,* 416 F.Supp. 435 (D.C. 1976).

nor do they point with any specificity to the victims, no less make any attempt to tailor the relief accordingly. The result, whether intended or not, is preferential treatment of blacks solely on the basis of race.

Provision V adopts a "goal" for the company to obtain in filling its supervisory work force to be met by 1980. Despite plaintiffs' protest to the contrary, this Court sees it for what it is, a quota, plain and simple. With respect to quotas this Court reviewed the law recently in *Cramer* v. *Virginia Commonwealth University, supra,* and found that sex based quotas were contrary to both the letter and spirit of the law. The parties have cited the Court to no binding authority that the law is any different with respect to racial quotas. The law reviewed earlier in this opinion affirms the conclusion that racial preferences are forbidden in this nation.

IX

The parties suggest that the decree is intended to overcome the last vestiges of racial discrimination. But the Court perceives no such vestiges. Indeed, the facts admitted by the parties show that with great rapidity and without any decree the artificial racial barriers have completely dissolved at the plant.

The parties further suggest that the decree is a mere redundancy since Executive Order 11246 provides for precisely the procedure and quotas provided for in the Consent Decree. While this Court has held that Executive Order 11246 does not and cannot require racial quotas under our present Constitution and laws, still, if the parties be right this Court has other things to do than enter surplusage in the form of a court order. Court orders are not intended for anything but serious problems.

Finally, the parties say that the mandate of Title VII will be satisfied by adoption of the Consent Decree which is to say that Title VII sanctions preferential treatment and quotas. As we have heretofore demonstrated, Title VII was never so intended. Its strongest supporters specifically and unequivocally disclaimed any intention to turn this country down the mirey road of quotas and racial preferences.

This Court is sympathetic to the need and is aware of the perplexity of rectifying the effects of past racial discrimination and eliminating present racial discrimination. But the mere waving of the banner does not mean that it is appropriately raised; it does not make that which is illegal legal and does not make that which is unjust, just.

In *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505, 516 (E.D. Va. 1967), the Court, speaking with regard to Title VII, stated:

> [T]he legislative history indicates that a discriminatory seniority system established before the act cannot be held lawful under the act. The history leads the court to conclude that Congress did not intend to require "reverse discrimination"; that is, the act does not require that Negroes be preferred over white employees who possess employment seniority. It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act.

This is the essence of the dilemma courts are faced with in racial discrimination cases. Where the Court has before it victims of discrimination and innocent third parties it has the hard task of fashioning a remedy that will attempt to make the victims whole without unduly affecting the

rights of innocent third parties—a difficult problem indeed but one the Court must confront. The problem must be solved by means of equitable relief, not preferential treatment or quotas. The latter two methods serve to evade and perpetuate rather than face the problem. They apply cosmetic relief to the symptoms, but fail to address the substance of the problem. They give employers and unions a safe refuge from the rigors of non-discriminatory hiring; so long as the quota is met they will be safe. Under the Decree proposed herein any relief to victims of discrimination is incidental, persons who do not deserve to benefit, benefit; and persons who do not deserve to suffer, suffer.

A popular theory is that every black is in some sense a victim of racial discrimination and that all whites share the guilt. This notion perhaps makes preferential treatment and quotas more palatable to some. But a Court of law cannot render decisions on the basis of guilt theories nor may such theories be permitted to influence its judicial thinking. A Court is constrained to perceive victims as subjects of violations of the law and is constrained to perceive guilt in terms of legal guilt. The proposed Consent Decree herein, rather than aiding victims of violations of the law, would itself violate the law and victimize innocent people both black and white.

When the parties have settled their differences without a violation of the law and without violating the right of any class members, the Court will enter an appropriate order without prejudice to the right of any person to seek redress for racial discrimination. But this Court will not, by entering the proposed Consent Decree provide the parties with a judicial license to practice racial discrimination.

An appropriate order shall issue.

Order of the District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0553-R

FRANK L. CARSON, *et al.*,

v.

AMERICAN BRANDS, INC., *et al.*

ORDER

For the reasons stated in the attached memorandum the sketch for a Consent Decree tendered by the parties hereto on 1 April 1977 is REFUSED.

Let the Clerk send a copy of this order to all counsel of record.

/s/ WARRINER
United States District Judge

Date: 1 June 1977
Filed June 2 1977
Clerk, U.S. Dist. Court
Richmond, Va.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2260

FRANK L. CARSON, LAWRENCE HATCHER, STUART E. MINES,

Appellants,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL; TOBACCO WORKERS INTERNATIONAL UNION,

Appellees.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal is dismissed.

WILLIAM K. SLATE, II
Clerk

Filed Sept. 14, 1979
WILLIAM K. SLATE, II
Clerk